

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL HOWARD RACHLIN,
Appellant,
vs.
RENEE BAKER, WARDEN; AND THE
STATE OF NEVADA,
Respondents.

No. 71456

FILED

JUL 12 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Michael Howard Rachlin appeals from an order of the district court dismissing the postconviction petition for a writ of habeas corpus he filed on August 20, 2015.¹ Second Judicial District Court, Washoe County; Jerome M. Polaha, Judge.

Rachlin argues the district court erred by denying his claim counsel was ineffective for misinforming him he was not allowed to file a direct appeal because he pleaded guilty and counsel should have filed an appeal on his behalf because he expressed dissatisfaction at sentencing.

We conclude the district court erred by denying this claim without first holding an evidentiary hearing. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). When a petitioner has been deprived of a direct appeal due to counsel's deficient performance, prejudice may be presumed. *Toston v. State*, 127 Nev. 971, 976, 267 P.3d 795, 799 (2011). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

The duty to inform a defendant who pleaded guilty about the right to appeal only arises when the defendant inquires about the right to appeal or when the defendant may receive a benefit from receiving such advice. *Toston*, 127 Nev. at 977, 267 P.3d at 799. However, when counsel misinforms a client about the right to appeal it "may render the right to appeal and to counsel on appeal meaningless by deterring a client from requesting a direct appeal, inquiring into the procedures for a direct appeal, or filing an appeal." *Id.* at 978, 267 P.3d at 800. Like in *Toston*, while Rachlin was "correctly informed of his limited right to a direct appeal in the written plea agreement, the record is not sufficient to belie his allegation that he did not pursue an appeal due to the alleged misinformation from counsel." *Id.* (internal citations omitted). Therefore, the district court erred by denying this claim without holding an evidentiary hearing.² See *Hargrove v. State*, 100 Nev. 498, 502-03, 686

²However, we also conclude the district court did not err by denying Rachlin's claim counsel should have filed a notice of appeal because he expressed dissatisfaction at sentencing. Rachlin failed to support this

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P.2d 222, 225 (1984) (to warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record, and if true, would entitle him to relief). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.³

Silver C.J.
Silver

Tao J.
Tao

Gibbons J.
Gibbons

...continued

claim with specific facts that, if true, entitled him to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.

³To the extent Rachlin claims counsel was ineffective for failing to prepare for the sentencing hearing, this claim was not raised in his petition below and we decline to consider it for the first time on appeal. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Hon. Jerome M. Polaha, District Judge
Michael Howard Rachlin
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk